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ABSTRACT

This pamphlet considers students' right to privacy and the application of this right to the confidentiality of information disclosed to administrators and counselors. Privacy is also considered in regard to special problems associated with counseling students about drugs, contraceptives, sexually transmitted diseases, abortion, and possible threat in the case of a dangerous student. Confidentiality in counseling is extremely important and plays a large role in the decision of a student to speak with a counselor, yet the parents of the minor have a legal right to make decisions for their children. To create an atmosphere of trust, students should be told when information will not be kept confidential. Counselors who see students believed to be dangerous may have to refer the student to a mental health professional or authority, because of the schools' obligation to maintain a safe environment. All cases of abuse or neglect must be reported, regardless of the source of information, in compliance with state law. Failure to report suspected incidents may have more serious repercussions than an incorrect report made in good faith to an appropriate agency; criminal charges could result if a child is injured after the counselor had become aware of the potential danger. (WTH)

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STUDENT PRIVACY AND SCHOOL RESPONSIBILITY

Administrators and counselors often face situations in which responsibility to parents or the public may conflict with the privacy rights of students. In this Memorandum we will consider the students' right to privacy and the application of this right to the confidentiality of information disclosed to administrators and counselors, and to special problems associated with counseling regarding drugs, contraceptives, sexually transmitted diseases, and abortion.

Problems with dangerous students and students who may be abused will also be considered.¹

I. Rights of Privacy

Types of Privacy. The right of privacy is not well defined. However, at least three kinds of privacy can be identified as legally protected interests: Autonomy, Information, and Security.

1. Autonomy refers to the right to make critical personal decisions without significant government interference. This is the right of privacy that has been most clearly associated with constitutional rights applicable to such important personal decisions as child bearing, child rearing, and family life. Of particular importance to this right of privacy are decisions concerning bodily integrity, such as what medical treatment will be accepted.

2. Information refers to the right to control and limit information about personal aspects of one's life. As information becomes more intensely personal, the interest in information privacy strengthens. For example, information that is revealed during psychotherapy and involves the most intimate details of life is likely to be more sensitive and private than banking information.²

3. Security in person, papers and property is a third kind of privacy, often associated with the Fourth Amendment prohibition of unreasonable searches and seizures. It is considered elsewhere and will not be reviewed extensively in this article.³

Sources of Privacy. There are several sources for rights of privacy, including the United States Constitution, statutes, and the common law.

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The constitutional right of privacy is one of the most important personal rights developments of our time. It clearly applies to the decision to conceive⁴ or to bear a child.⁵ In addition, the Supreme Court has indicated that the right to have an abortion extends to minors,⁶ that a minor cannot be routinely required to obtain parental permission prior to abortion,⁷ and that a minor has the right to obtain at least some kinds of contraceptives without parental consent.⁸ Thus, the constitutional right of privacy applies at least in limited form to minors as well as adults.

A number of federal and state statutes now protect rights of privacy. For example, the Family Educational Rights and Privacy Act of 1974 provides parents and students with some protection of information privacy rights.⁹ Courts are also developing a common law right of privacy. The common law protects, among other concerns, various individual interests in autonomy, information, and security.

Privacy rights, regardless of their source, are not absolute rights of course. Other important interests such as accountability, the rights of others, and the protection of human life are the basis for invading some privacy interests. Even a constitutionally protected right of privacy may be invaded in pursuit of a compelling state interest.¹⁰

II. Information Revealed in Counseling

Whose information is it anyway? A most complex question is who may have access to information students reveal during counseling. It is important to draw a distinction between confidentiality and privilege. Confidentiality is the general legal and ethical obligation of professionals to maintain secrets revealed to them by clients. A privilege is the right of an individual to refuse to release, or prevent a counselor from releasing, to a court information concerning therapy. Thus, while a privilege may be seen as one way of implementing or protecting confidentiality, it is a much narrower concept than confidentiality.

Confidentiality. Confidentiality is obviously important to counseling; many believe that psychotherapy requires confidentiality as necessary for success. Therefore, if information from counseling can be released, the counseling function may be threatened.

Protecting confidentiality in counseling can place conflicting demands on counselors. The student has an obvious interest in privacy. At the same time, parents want to know about their children and ordinarily have a legal right to make most decisions for their minor children. In addition, as the employer, the school may demand that the counselor release information. Balancing these competing demands for secrecy and information is difficult and important.

Much of what is said in this Memorandum concerning the relationship between student and counselor is also true of the administrator-student relationship. Certainly, the administrator's general duty to students and their parents is no less than that of counselors. In some cases, however, it is likely that the administrator-student relationship might be treated somewhat differently by the courts than would the relationship of a counselor to a student.

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Thus, in a situation in which the administrator is the disciplinarian or even the investigator of an incident that might result in disciplinary action against a student, the administrator should not suggest that information given by the student will be held in confidence or will not be used against the student unless the administrator actually intends to abide by such suggestions.

Indeed, such an intention on the part of an administrator, even if implied during a discussion with a student, could be held to be enforceable against the administrator and the school district. Even if it were not, however, it would be poor policy for administrators to renege on any assurances given to a student in a disciplinary setting.

The student's age will obviously play a role in the necessity for confidentiality and in the expectations of the student concerning privacy. For older students, secrecy may be more important and they may be less likely to reveal information without an assurance of confidentiality.

Students should be told when information will not be kept confidential. This is a strong argument for establishing a clear protocol or policy within the school concerning the transfer of information to parents, school authorities, teachers, the permanent records of the school, and others outside the school. Such a policy could go a long way in creating an atmosphere of trust that will encourage effective counseling.

Some caution should be exercised concerning the maintenance of records. Unnecessary records should not be kept and those that are kept should be secured and couched in language that will not be misunderstood by others who may have access to the records.

Privileges. Some states now provide testimonial privileges in court proceedings that protect communications between counselors and students. A Kentucky statute provides an example of such a privilege.

Any certified counselor who meets the requirements issued pursuant to the authority of KRS 161.030, and who is duly appointed and regularly employed for the purpose of counseling in a public or private school of this state, shall be immune from disclosing in any civil or criminal court proceeding, without the consent of the student counselee, any communication made by the student counselee to the counselor in his professional character, or the advice thereon. If the student counselee is less than eighteen (18) years of age, neither the communication nor advice thereon shall be disclosed in the court proceeding without the consent of the student counselee and his parent or legal guardian. [Ky. Rev. Stat. Ann. Sec. 421.216]

Even when provided by state statute, privileges are not absolute, however. They exist for the benefit of the client (or the client and parents) and may be waived by them. Privileges apply only in state courts or in federal diversity cases in which state law is applied.

The Federal Rules of Evidence provide that federal common law privileges apply in federal cases. Ordinarily, privileges are destroyed if the confidentiality of the communication is broken in any manner. In addition, there are a number

of common exceptions to privileges that would undoubtedly apply to a counselor-counselee relationship whether or not specifically provided by statute.

For example, a patient-litigant exception (where a patient raises his or her own emotional condition at a trial), a child abuse exception, and a child custody case exception probably exist.

If there is an exception to a privilege, the professional may be required to reveal in court confidential information revealed by the patient during counseling. The limitations on, and exceptions to, privilege substantially reduce the degree to which a counselor can rely upon them.

It is also important to remember that the existence of the privilege does not settle the question of whether parents or school officials may successfully demand information from counselors concerning information learned during therapy.

Finally, in absence of a statute specifically providing for a privilege protecting communications between students and counselors, none are apt to be recognized by a court.

III. Consenting to Treatment

Except in emergencies, medical treatment can usually be given legally only if the patient has consented to it. Parents are authorized to consent to treatment for their minor children, and minors are generally not permitted to consent to treatment without parental authorization. Therefore, counselors wishing to refer minors to other agencies for treatment may have to obtain parental consent. Emancipated children (ordinarily children who are married, living on their own, or pregnant) may consent to their own treatment.

Some modifications in the parental consent rules have been provided where the minors' strong health and privacy interests are more important than parental consent rules. For example, Kentucky provides that minors may consent to treatment for venereal diseases, alcohol and drug abuse, care during pregnancy, and contraception. The statute specifically excludes abortions and sterilization from the procedures to which a minor can consent.

The United States Supreme Court has held that minors have a right to make many decisions for themselves concerning procreation and that the right of privacy includes the right to have access to some contraceptives.¹¹ A state may not, therefore, completely prohibit the use or availability of nonprescription contraceptives to minors. The Court has also struck down a number of efforts to restrict a minor's right to abortion¹² or to require parental consent prior to abortion.

Despite the extension of these rights to minors, pregnant girls face a difficult task in obtaining parental or judicial permission for an abortion. Counselors may be called upon to guide pregnant adolescents to agencies or services that can assist them in understanding and complying with the legal requirements for obtaining an abortion.

IV. The Dangerous Student

Counselors who see students whom they believe are dangerous to others may have an obligation to take reasonable steps to avert the threat. The counselor may have an obligation both to the potentially dangerous student and to the potential victims.

The dangerous student almost certainly presents a case that should be referred to a mental health professional or other authority. In addition, counselors must protect potential victims.

A school has an obligation to others in the school to maintain a reasonably safe environment. Failure to take steps to prevent others in school from being harmed may lead to civil liability. Mental health professionals in some states have an obligation to warn or take other reasonable steps to protect potential victims of their patients. It is not clear whether this rule of liability will apply nationally, or if applied nationally, whether it will apply to counselors as well as mental health professionals.

In addition to private referrals, a counselor faced with a violent student who is committing crimes may consider invoking criminal or juvenile court proceedings. Counselors may also consider involuntary civil commitment for such students. There may be substantial political and practical problems with either approach and a possible disservice to the student involved. Therefore, these responses must be used with great caution.

Sometimes, as in Kentucky, minors 14 years or older may voluntarily admit themselves to a mental hospital, although the admission must be reviewed by a physician. The child's parents or legal guardian must be notified immediately of the admission and of their right to seek discharge. An involuntary form of commitment is also available if the student is mentally ill and possibly dangerous. Treatment is available at the place of commitment and hospitalization must be the least restrictive response available.

V. Abused Students

School personnel in every state are required to report known or suspected cases of child abuse or neglect. School officials, including counselors, have an obligation to report child abuse regardless of the source of the information. Information received from the student or from siblings of the abused student may be a basis of information that must be reported.

The definition of abuse and neglect is extremely broad under most statutes and may encompass the following: physical injury; emotional injury; risks of physical or mental injury; sexual abuse; abandonment; inadequate care or supervision; or the failure to provide food, clothing, shelter, education, or medical care.

Usually, when school personnel have reasonable cause to believe that such abuse or neglect has occurred, it must be reported. An immediate report should be

made by telephone to the designated social service agency and in some cases a written report may be required. Reports filed in good faith should not result in liability even if they turn out to be incorrect because the reporting statutes provide immunity against such liability to all those required to make reports.

While suits by parents have not been frequent, even where there was no clear indication of abuse, the courts have tended to protect school personnel acting in good faith to ensure the safety and welfare of students. In one recent case, a guidance counselor was sued by parents because the counselor reported the parents' arrest for drunkenness to child welfare authorities, allegedly in the hope that the student involved would be placed in temporary foster care. The court dismissed the case, holding that the counselor should be granted immunity because of the good faith that motivated her actions.¹³

A student will rarely attempt to hold a counselor legally liable for the counselor's action regarding the student's behavior; these attempts have usually not been successful either. In a recent case, for example, a former high school student brought an action against the guidance counselor and other school defendants alleging negligence, defamation of character, and violation of constitutional rights as a result of referral to a social welfare agency. The referral was made on the basis of information concerning the student's family relationships, religious beliefs, and sexual orientation revealed in counseling sessions at the school. The claim was dismissed on the basis that the counselor was entitled to qualified immunity against such an action so long as the information was disclosed only to appropriate public agency personnel. The Court also said that to the extent that the referral was made for the purpose of securing psychiatric testing, it was also protected by the state's child protective services act.¹⁴

The failure to report suspected incidents which might be harmful to a student may well have more serious repercussions than any report made in good faith to an appropriate social welfare agency. Such failure may result in criminal charges (misdemeanor) and can also result in civil liability if the child suffered serious injury after the counselor or administrator knew, or should have known of the incident that resulted in the injury.¹⁵

The extreme breadth of many child abuse reporting statutes and the absence of any meaningful definition of terms often leaves professionals at a loss to know what they are required to report. The uncertainty as to what is and is not child abuse and what must be reported may adversely affect the ability of authorities to discover and successfully deal with child abuse.

The National Study of Child Abuse found that nearly 60 percent of the children reported to child protection agencies as victims of abuse could not be substantiated as being actual victims of abuse¹⁶. The problem of overreporting is significant. The National Study estimated that 1.1 million child abuse and neglect reports were filed with child protective services agencies for the last half of 1979 and the first half of 1980. More than 600,000 of these reports probably could not be substantiated even using the expansive definitions of child abuse often employed by protective service agencies.

Paradoxically, the uncertainty concerning the definition of child abuse and neglect may also contribute to a significant failure to report. The National Study found that 68 percent of the children who were reported to the Study as being within the study's definition of abuse and neglect were not reported to a child protection agency or otherwise known to such an agency. Only 21 percent of the cases of child abuse noted by agencies other than child protection agencies were reported to a child protection agency. If anything, the actual rate of reporting nationwide may be even lower than is indicated by the study. The definition of abuse and neglect should be narrowed and sharpened through clearer and more precise definitions so that counselors and educators can know what they are required to report. Laws should also be strengthened to encourage abusers to voluntarily seek therapy, rather than discourage them from doing so for fear of prosecution.

Conclusion

The rights of autonomy and information privacy play increasingly important roles in the counseling of students. These rights may protect some information revealed by students and broaden the treatment choices available in critical areas of contraception, abortion, and alcohol and drug abuse. The importance of confidentiality suggests that the scope of information that will be released from counseling sessions should be clearly understood by the counselor and student alike. Particularly when dealing with high school students, the assurance that their secrets will be safe with the counselor may play an important role in the decision to discuss matters with the counselor.

Situations may also arise in which schools and counselors have some obligation to protect other students, and perhaps other citizens, from the violence of dangerous students. It is often critical that the dangerous students be referred to other agencies.

Child abuse reporting statutes require that reports be made to social service agencies concerning a broad range of actual or suspected child abuse. The very broad nature of many abuse statutes makes this a difficult obligation for the counselor. Counselors may play a critically important role in helping to define what the law is concerning these important issues. Individually, and as members of professional organizations, counselors and administrators should urge state legislatures to enact regulations that will protect counseling relationships and promote the counseling of students.

This Legal Memorandum was revised from an article by Steven R. Smith, professor of law, at the University of Louisville School of Law. The article appeared in the Winter 1986 issue of the Journal of Law and Education, published by the Jefferson Law Book Company, Cincinnati, Ohio, edited by the University of Louisville School of Law and the University of South Carolina School of Law.

Footnotes

1. In most of the subjects discussed, state law plays an important role. The reader should always check applicable statutes to see how they may affect the general principles of law outlined here.
2. See NASSP Legal Memo, "The Student's Privacy: A Developing Concept. Part One: Student Records" (January 1983).
3. See NASSP Legal Memo, "The Student's Privacy: A Developing Concept. Part Two: School Searches" (April 1983), and "Legal Brief," NASSP Bulletin May 1985.
4. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
5. *Roe v. Wade*, 410 U.S. 113 (1973).
6. *Bellotti v. Baird*, 443 U.S. 622 (1979).
7. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).
8. *Carey v. Population Services International*, 431 U.S. 678 (1977).
9. 20 U.S.C. Sec. 1232(g) (1982 & Supp. 1985).
10. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).
11. *Carey v. Population Services International*, supra, footnote 8.
12. *Bellotti v. Baird*, *Planned Parenthood of Missouri v. Danforth*, supra footnotes 6 and 7.
13. *Dick v. Watonwan County School Dist.*, 551 F. Supp. 983 (U.S.D.C. Minn. 1982).
14. *Roman v. Appleby*, 558 F. Supp. 449 (E.D. Pa. 1983).
15. See, e.g., Note, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 *Wayne L. Rev.* 183 (1981).
16. See U.S. Center on Child Abuse and Neglect, *National Study of the Incidence and Severity of Child Abuse and Neglect* (DHHS 1981) hereinafter cited as the National Study.

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